

**MARSHALL, AS RECEIVER OF ALL PACKAGE
GROCERY STORES COMPANY, v. PEOPLE OF
THE STATE OF NEW YORK.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

No. 294. Submitted October 12, 1930.—Decided December 30, 1930.

1. At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due to it, whether the property was in possession of the debtor or of a third person, or in *custodia legis*; and the priority could be defeated or postponed only through passing the title to such property, absolutely or by way of lien, before the sovereign sought to enforce his right. P. 382.
2. A like right of priority, based on sovereign prerogative, belongs to the State of New York, as her highest court has decided, through her adoption, by her constitutions, of the common law, and attaches to a debt due the State by a sister-state corporation as a license fee or tax for the privilege of doing business in New York, although no statute of the State makes the tax a lien or declares its priority. P. 383.
3. The question whether this priority is a prerogative right or a rule of administration is a question of local law, the determination of which by the highest court of the State concludes the federal courts. P. 384.
4. The priority extends to all property of the debtor within the borders

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of the State, whether the debtor be a resident or a non-resident, and is enforceable against such property in the hands of a receiver appointed by a federal court within the State, since such a receiver takes property subject to all liens, priorities or privileges existing or accruing under the state laws. P. 385. *City of Richmond v. Bird*, 249 U. S. 174, distinguished.

382 Fed. Rep. 727, affirmed.

THE case is stated in the opinion.

Mr. A. S. Gilbert, Mr. Francis Gilbert and Mr. William J. Hughes for petitioner.

Mr. Corliss A. Johnson and Mr. Robert P. Beyer for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On December 4, 1917, the District Court of the United States for the Southern District of New York appointed H. Snowden Marshall general receiver of the property of the All Package Grocery Stores Company, a corporation organized under the laws of Delaware, but having a place of business and property in the State of New York. The latter State asked to have certain debts due to it declared payable as preferred claims out of the assets in the hands of the receiver. These debts consisted of (a) amounts due for annual franchise taxes assessed under § 182 of the New York Tax Law, and (b) amounts due for license fees or taxes for the privilege of doing business within the State, assessed under § 181 of that law and payable but once. The State asserted in its claim "that said taxes accrued and became a lien on all the property of the defendant corporation pursuant to the provisions of the Tax Law of the State of New York prior to the appointment of the receiver herein." The District Court held that both

classes of claims were taxes, but that the lien created by § 197 of the Tax Law applied only to annual franchise taxes and that no provision of the law gave a lien for license taxes until a levy was made therefor. It accordingly allowed the preference as to the amounts due for annual franchise taxes and denied it as to the amounts due for license taxes. Upon appeal by the State, the Circuit Court of Appeals held that, independently of specific statutory provision, the law of New York as declared by its courts gave to the State as sovereign a lien or priority for payment of taxes over unsecured creditors; that this priority was a prerogative right, not a mere rule of administration; and that it applied, therefore, in the federal courts, 262 Fed. Rep. 727. The case came here on writ of certiorari, 252 U. S. 577. The propriety of allowing to the State a preference as to amounts due for the annual franchise taxes is admitted by the receiver. No question of the relative priority of the State and the United States is involved. Nor does any question arise as to priority of the State over incumbrances. The single question is presented whether the State of New York has priority in payment out of the general assets of the debtor over other creditors whose claims are not secured by act of the parties nor accorded a preference, by reason of their nature, by the state legislature or otherwise.

At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in *custodia legis*. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. *Giles v. Grover*, 9 Bing. 128, 139, 157, 183; *In re Henley & Co.*, 9 Ch. D. 400. Compare *United States v.*

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National Surety Co., decided by this court November 8, 1920, ante, 73. The first constitution of the State of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of the Colony on April 19, 1775, should be and continue the law of the State, subject to such alterations as its legislature might thereafter make. This provision was embodied, in substance, in the later constitutions. The courts of New York decided that, by virtue of this constitutional provision, the State, as sovereign, succeeded to the crown's prerogative right of priority; and that the priority was not limited to amounts due for taxes, but extended alike to all debts due to the State, *e. g.*, to amounts due on a general deposit of state funds in a bank. *Matter of Carnegie Trust Co.* 151 App. Div. (N. Y.) 606; 206 N. Y. 300. This priority has been enforced by the courts of New York under a great variety of circumstances in an unbroken series of cases extending over more than half a century.¹ It has been enforced as a right and not as a rule of administration.

This priority arose and exists independently of any statute. The legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority.² The only changes of the right made by statute have been by way of enlarging its scope in

¹ See in addition to cases cited in the text: *Matter of Receivership of Columbian Insurance Co.*, 3 Abb. N. Y. Ct. App. Dec. 230, 242 [1866]; *Central Trust Co. v. New York City & Northern R. R. Co.*, 110 N. Y. 250, 259 [1886]; *Matter of Atlas Iron Construction Co.*, 19 App. Div. (N. Y.) 415, 419 [1897]; *Matter of Niedenstein*, 154 App. Div. (N. Y.) 228, 246 [1912]; *Matter of Wesley*, 156 App. Div. (N. Y.) 403, 405 [1912]; *People v. Metropolitan Surety Co.*, 156 App. Div. (N. Y.) 647, 650 [1912]; *Miner v. Mohawk Clothing Co., Inc.*, 155 N. Y. S. 647 [1912].

² See *Matter of Niedenstein*, 154 App. Div. (N. Y.) 228, 244-6; *Matter of Wesley*, 156 App. Div. (N. Y.) 403, 405.

v. *David C. Beggs Co.*, 171 Fed. Rep. 157; *Coy v. Title Guarantee & Trust Co.*, 212 Fed. Rep. 520, 523; 220 Fed. Rep. 90. The right of priority has been likened to an equitable lien. *State v. Rowse*, *supra*. The analogous preference in payment given to claims for labor by state statutes, and to which the Bankruptcy Act gives priority, have been described as being "tantamount" to a lien. *In re Laird*, 109 Fed. Rep. 550, 555; *In re Bennett*, 153 Fed. Rep. 673, 677. The priority is a lien in the broad sense of that term which includes "those preferred or privileged claims given by statute or by admiralty law." 2 Bouvier Law Dict. (15th ed., 1883) 88. The prerogative right of the State resembles the privilege accorded by the civil law of Louisiana to certain classes of debts which it was assumed in *Burdon Central Sugar Refining Co. v. Payne*, 167 U. S. 127, would be enforced against property in the custody of a receiver appointed by a federal court. The fact that the right rests on the common law independently of any statute, does not, of course, affect the right of enforcement in the federal courts.

City of Richmond v. Bird, 249 U. S. 174, relied upon by the petitioner is not in point. The city sought there in vain to have taxes declared payable out of the bankrupt's assets in preference to the claim of the landlord thereon which was secured by a specific lien arising upon distraint. This court held that the city did not have such superior right since neither the laws of the United States nor those of Virginia accorded such priority. Here it is not sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York.

Affirmed.